Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1977

No. 77-1153

THOMAS REESE

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. .....

THOMAS REESE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Thomas Reese, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 17, 1977.

OPINION BELOW

The unpublished opinion of the Court of Appeals

appears in the attached appendix. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 17, 1977. A timely petition for rehearing *en banc* was denied on January 13, 1978, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is a defendant charged with receiving a firearm while under indictment, in violation of 18 U.S.C. § 922(h)(1), entitled to an instruction to the jury that they must find that he had knowledge that he was under indictment when he received the firearm in order to find him guilty?

2. Does 18 U.S.C. § 922(h)(1) violate the commerce clause because its scope exceeds the findings of Congress regarding the impact of firearms on interstate commerce?

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code:

Section 922(h)(1):

"It shall be unlawful for any person–

(1) who is under indictment for, or who

has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

STATEMENT OF THE CASE

On May 3, 1976, an indictment was returned in the United States District Court for the Central District of California charging Thomas Reese with two violations of 18 U.S.C. § 922. Count one charged him with making a false statement in connection with the purchase of a firearm, in violation of subsection (a)(6), and count two charged a receipt of a firearm while under indictment for a crime punishable by imprisonment for a term exceeding one year, in violation of subsection (h)(1). Mr. Reese's Rule 29 motion was granted as to count one at the close of the evidence, and this petition thus deals only with 18 U.S.C. § 922(h)(1).

Both counts were based upon Reese's purchase of a shotgun for his girl friend at a sporting goods store in Los Angeles. The false statement count alleged that Reese made a false statement in connection with the completion of an Alcohol, Tobacco and Firearms form filled out at the time of the purchase. Based upon Reese's testimony, as well as that of others who had purchased firearms from the store in question, the district court doubted the government's testimony in support of that count and

acquitted Reese.

Prior to the instruction of the jury, defense counsel requested the district court to instruct the jury that Reese had to know that he was under indictment for a crime punishable by more than a year's imprisonment at the time he purchased the shotgun. That instruction was refused in spite of Reese's testimony that he did not know that he was under indictment at the time of the purchase.[1]

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Court Of Appeals Conflicts With The Decision Of The Sixth Circuit Court Of Appeals In The Case Of *United States v. Renner*, 496 F.2d 922 (6th Cir. 1974), And This Court Should Resolve That Conflict.

While the Congress may in certain circumstances enact criminal laws which do away with the requirement of intent, *United States v. Freed*, 401 U.S. 601 (1971); *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960), the general rule is that a showing of intent or *mens rea* is required as to the elements of a crime. The *mens rea* requirement . . .

> "is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will

[1] The evidence showed that Reese was in fact under indictment at the time of the purchase. That indictment charged a violation of the income tax code and resulted in an acquittal after Reese's trial in this case.

> and a consequent ability and duty of the normal individual to choose between good and evil."
>
> *Morrissette v. United States*, 342 U.S. 246 250 (1952).[2]

Here, as in *Morrissette*, the Court is faced with a statute which does not, on its face, require *mens rea*. As in *Morrissette*, though, intent should be read into the statute. Had the facts been as he thought them to be, petitioner would have committed no crime:

> "[I]f a person is ignorant of or mistaken about a matter of fact or law and the ignorance or mistake negates the kind of culpability required for the commission of the offense, he does not commit the offense even if his conduct would have constituted the offense had his information been correct."
>
> *Working Papers of the National Commission on Reform of the Federal Criminal Laws* 135 (1970); see Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 108 - 109.

There was nothing inherently criminal or evil about petitioner's purchase of a shotgun, and nothing to alert him to the possibility that his act might be a crime. *Compare United States v. Freed, supra*, and *United States v. Dotterweich*, 320 U.S. 277 (1943), *with Lambert v. California*, 355 U.S. 225 (1957), and *Morrissette v. United*

[2] See also Model Penal Code § 2.05 (Tent. Draft No. 4, 1955); G. WILLIAMS, CRIMINAL LAW §§ 70 - 76 (1953); Hart, *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 422 - 25 (1958); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 (1933).

States, supra.[3]

Unlike the defendant in *United States v. Freed, supra,* petitioner was not involved with hand grenades or other unusual weapons. See *United States v. Freed, supra,* 401 U.S. at 616 (Brennan, J., concurring). Rather, he merely purchased a shotgun from a sales clerk in a sporting goods store.

It was not the nature of his *act* which was prohibited, it was the commission of that act by a person of Reese's *status.* The only question here is whether Reese was entitled to have the jury instructed that it was the government's burden to prove that he knew of his status when he obtained the shotgun.

Reese testified that he did not know that he was under indictment when he purchased the shotgun. In the Sixth Circuit that testimony would have entitled him to an instruction to the jury to the effect that a mistake of fact as to one's status as a person under indictment is a defense to a charge under 18 U.S.C. § 922(h)(1). *United States v. Renner,* 496 F.2d 922 (6th Cir. 1974). In the Ninth Circuit, on the other hand, such an instruction apparently need not be given. But see *United States v. Reese,* memorandum opinion at part (4) (Appendix p. 2).

The fact that Reese would require the government to prove in 922(h)(1) cases that the person receiving a firearm knows that he is under indictment is one like many others which must be proven in criminal cases. It is amenable to proof by circumstantial evidence and, unlike

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[3]Note that there *was* an attempt by the government to show the probability of knowledge of his indictment on the part of Mr. Reese. See *Lambert v. California,* 355 U.S. 225 (1957).

proof that a defendant knew that a certain firearm was or was not registered, the requirement of its proof would not undermine the government's ability to obtain convictions.

In fact, Reese was cross-examined on the issue of his knowledge that he was under indictment. The prosecutor elicited testimony from Reese that he had been indicted several times in order to show that Reese knew what an indictment was and that he therefore knew that he was under indictment when he purchased the shotgun. That line of questioning was proper only if, as the United States Attorney stated at the time, knowledge was a jury issue. Otherwise, such questions would be improper. Rules 608, 609, F.R.E. (1976).

Given Reese's acquittal on the false statement count, this case has assumed an interesting posture: Reese was convicted for violation of a federal statute on a strict liability theory. The jury was not even instructed that it had to find negligence on Reese's part; no mental state need have been shown. This Court's recent decision in *United States v. Park,* ..... U.S. ....., 95 S. Ct. 1903 (1975), seems to indicate that, *United States v. Dotterweich, supra,* notwithstanding, the Constitution requires that a defendant be at least negligent–that some *mens rea* be shown–in every case. *United States v. Park, supra,* 95 S. Ct. at 1912 ("highest standard of foresight and vigilance" is required by Act); Tushnet, *Constitutional Limitation of Substantive Criminal Law,* 55 B.U.L. REV. 775, 795 (1975).

In his noted article on *mens rea,* Professor Packer stated that, because of the stigma and possibility of loss

of liberty inherent in the criminal punishment process . . .

> "[n]o one should be sentenced to imprisonment or its equivalent without being afforded the opportunity to litigate the issue of *mens rea* . . . .
>
> Packer, *Mens Rea and the Supreme Court*, 1962 S. Ct. Rev. 107, 150.

It has been suggested that the Court's two recent decisions on the subject, in *Park* and in *Mullaney v. Wilbur*, ... U.S. ..... , 95 S. Ct. 1881 (1975), indicate that the Court has adopted Professor Packer's suggestion. Tushnet, *Constitutional Limitation of Substantive Criminal Law, supra*, 55 B.U.L. REV. at 800. Thus, where there is a possibility of imprisonment as punishment for a crime, the Due Process clause, or something, *Robinson v. California*, 370 U.S. 660 (1962), requires proof of *mens rea;* at the least it must be shown that the defendant acted negligently.[4]

Here, while there may or may not have been such a showing, it is clear that the jury was not properly instructed. The thesis set forth above not only explains the Court's decision in *Freed*, it distinguishes that case. In *Freed*, the Court, at least implicitly, applied a negligence standard to the defendant's conduct. Freed, said the Court, should have known better. The nature of the materials with which he dealt should have alerted him to the danger, the legal danger, inherent in his conduct.

Nothing about Reese's conduct should have warned him of the possible criminality of his act. He was entitled to rebut the government's charge against him, *Chambers v.*

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[4] And, of course, the jury must be instructed that it cannot convict absent such a showing. See *Mullaney v. Wilbur*, 95 S. Ct. 1881 (1975).

Mississippi, 410 U.S. 284, 294 (1973), but his attempted rebuttal was made meaningless by the court's refusal to instruct the jury that his mistake of fact was a defense.

2. Title 18 U.S.C. § 922(h)(1) Violates The Commerce Clause To The Extent That It Purports To Regulate The Acquisition Of Shotguns.

The commerce clause limits the regulatory power of Congress. Congress may regulate intrastate activities only when they substantially affect interstate commerce. *Perez v. United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). In order to determine whether § 922 is a valid attempt by Congress to control the purchase of firearms, this Court must determine:

> "(1) Whether Congress had a rational basis for finding that receipt or possession of a firearm by [a person under indictment] affects commerce and (2) if it had such a basis, whether the means it selected to protect commerce are reasonable and appropriate."
>
> *United States v. Synnes*, 438 F.2d 764, 767 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

While the validity of § 922 has been upheld in the face of Commerce Clause attacks in the past, the cases have dealt with arms dealers who were not licensed or with the purchase of handguns. In those cases, the courts of appeal found a sufficient connection with interstate commerce because of the *dealers'* connection with inter-

state commerce or because of the grave threat that handguns pose to our society. See *United States v. Hornback,* 489 F.2d 1325 (7th Cir. 1973); and *Mandina v. United States,* 472 F.2d 1110 (8th Cir. 1973).

Here, the gun purchased was a shotgun. The Congressional Declaration of Purpose which relates to § 922 states:

> "The Congress hereby declares [that] it is not the purpose of this Title to place any undue or unnecessary federal restrictions or burdens on . . . the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activities . . . , § 101 of Pub. L. 90-618.
>
> '(2) that the ease with which any person can acquire firearms *other than a rifle or shotgun* . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States; * * * (5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding federal licenses . . . has tended to make ineffective the laws, regulations, and ordinances in the several states and local jurisdictions regarding such firearms; [and] (6) that there is a causal relationship between the easy availability of firearms *other than a rifle or shotgun* and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior."
>
> § 901 of Pub. L. 90-351.

Certainly the Commerce Clause does not prevent Congress from prohibiting the purchase of handguns by certain classes of persons. It is equally clear that the control of automatic weapons and explosives is permissible. However, the Congressional Declaration of Purpose in support of § 922 clearly indicates that there is no basis for the inclusion of shotguns within the ambit of the statutes.[5] That being the case, the provisions of § 922 which deal with the acquisition of shotguns exceed the power granted to Congress by the Commerce Clause.

CONCLUSION

For the reasons set forth above, it is submitted that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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[5] See 18 U.S.C. § 921(a)(4)(B), stating that a shotgun "is generally recognized as particularly suitable for sporting purposes."

APPENDIX

APPENDIX

MEMORANDUM OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. THOMAS REESE, Appellant.

No. 76-3100.

[FILED NOV 17 1977]

Appeal from the United States District Court for the Central District of California

Before: BARNES and GOODWIN, Circuit Judges and JAMESON*, District Judge.

The jury convicted Thomas Reese of violating 18 U.S.C. § 922(h)(1) (receiving firearm while under indictment). He appeals.

On October 11, 1972, Reese was indicted on four counts of willful evasion of income tax, and in due course pleaded not guilty and was released on bail pending trial.

On October 31, 1974, while still awaiting trial on the tax evasion indictment, Reese bought for his girl friend a Remington 12-gauge shotgun from a store on Western Avenue. At the time of the purchase he signed ATF Form 4473 which recited that he was not under indictment. He testified at the trial (1) that he did not know what an indictment was, and (2) that he did not read Form 4473 before he signed it.

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*The Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

The appellant's brief tenders a number of issues.

(1) The Constitutionality of The Statute

In material parts, § 922 is virtually identical to 18 U.S.C. App. § 1202, which has been held to be constitutional. *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976); *United States v. Thoresen*, 428 F.2d 654, 658-661 (9th Cir. 1970). We find no basis for a different rule for § 922.

(2) Sufficiency of The Evidence

The evidence presented a jury question.

(3) Motion to Suppress

The denial of motion to suppress certain evidence is not properly before us. The evidence was not used at the trial, and it was not shown to have led to the discovery of evidence that was used at the trial. The issue is, accordingly, moot.

(4) Failure to Instruct on Knowledge

Technically, no challenge to the instructions is properly before us because no transcript has been received showing either the instructions given or the requests refused. The transcript merely recites: "Whereupon, in open court, outside the presence of the jury, the jury instructions were discussed, reported, but not transcribed upon request." The transcript recites further that the jury instructions were read to the jury.

The designation of record asks for the "Court's Instructions", but counsel did not follow up the designation

to see that the instructions were transcribed. They have never reached this court. It is the duty of counsel to see that the record is complete.

On the merits, however, there is nothing to the appellant's point. We held in *United States v. Crow*, 439 F.2d 1193 (9th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972), that the government does not have to prove scienter. The point was reinforced in *United States v. Locke*, 542 F.2d 800 (9th Cir. 1976), and *United States v. Mathews*, 518 F.2d 1296 (9th Cir. 1975).

The elements of the crime are set out in the statute:

> "It shall be unlawful for any person–
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

18 U.S.C. § 922(h).

The defendant correctly cites *United States v. Renner*, 496 F.2d 922 (6th Cir. 1974), for the proposition that it is error in the Sixth Circuit to instruct the jury that "lack of knowledge that he was under indictment when he received the guns was no defense" to the count on receiving guns by an indicted person. In our case, however, the judge did not instruct that lack of knowledge was no defense; he did not instruct at all upon that issue.

Reese testified that he thought that as soon as he was arraigned and released on bail, which he had to admit had happened several times in more than one state, the indictment lapsed and became *functus officio*. The jury was free to believe this, if it wanted to, but it was not required to. On hearing such testimony, the trial judge should fashion a proper instruction, if one is requested, but on this record there is no proper request, and clearly no basis for a reversal.

On another point in the instructions, again there is nothing in the record to tell us what was requested or what was given. The court did take judicial notice that a violation of 26 U.S.C. § 7201 carries a penalty in excess of one year. It is not error to refuse to tell a jury that it can ignore a statute. It is especially not error when there was no request, of record, for such an instruction. *United States v. Houston,* 547 F.2d at 107-108. The court was not taking notice of a fact as a fact, but of a statute as law. This was not a hotly contested element of the crime; it appears in the appeal as an afterthought. There would have been no error even if the instruction had been requested and refused.

Affirmed.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on FEBRUARY 10th, 1978, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (REESE vs. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ASSISTANT UNITED STATES ATTORNEY
312 North Spring Street
Los Angeles, California 90012 (2 copies)

UNITED STATES DISTRICT COURT
312 North Spring Street
Los Angeles, California 90012
CASE NO. CR 76 579 RMT (1 copy)

UNITED STATES COURT OF APPEALS - NINTH CIRCUIT
U. S. Court of Appeals & Courthouse Bldg. - 7th & Mission Streets
San Francisco, California 94101 (1 copy)

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530 (3 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on FEBRUARY 10th, 1978, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS REESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1153

THOMAS REESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1977. A petition for rehearing was denied on January 13, 1978. The petition for a writ of certiorari was filed on February 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to an instruction that knowledge of being under indictment is an element of an offense under 18 U.S.C. 922(h)(1), which proscribes receipt of a firearm while under indictment for an offense punishable by imprisonment in excess of one year.

2. Whether Congress exceeded its power under the Commerce Clause in dealing with shotguns in 18 U.S.C. 922(h).

STATUTE INVOLVED

18 U.S.C. 922(h)(1) provides in pertinent part:

> It shall be unlawful for any person—
>
> (1) who is under indictment for * * * a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of knowingly receiving a firearm while under indictment for a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(h)(1).[1] He was sentenced to pay a fine of $750. The court of appeals affirmed (Pet. App. 1-4).

1. The evidence at trial showed that on October 31, 1974, petitioner purchased a Remington 12-gauge shotgun from a store in Los Angeles (Pet. App. 1; Tr. 175, 187). He had previously been indicted on October 11, 1972, on four counts of willful evasion of income tax, in violation

[1]A count charging petitioner with knowingly making a false statement in connection with the acquisition of a firearm, in violation of 18 U.S.C. 922(a)(6), was dismissed at the close of the evidence (Tr. 227). "Tr." refers to the trial transcript.

of 26 U.S.C. 7201,[2] and had been released on bail pending trial (Pet. App. 1; Tr. 92). At the present trial, petitioner acknowledged that he realized that his tax case was pending, but he testified that he did not know the meaning of "indictment" and that he had not read the form (ATF Form 4473) that customarily accompanies the purchase of a firearm (Pet. App. 1; Tr. 176-178). Petitioner also admitted that he had been indicted several times previously; he stated, however, that he thought the indictment lapsed after he posted bail, even though he realized that he still had to stand trial (Pet. App. 4; Tr. 191-192, 197-200).

Petitioner then asked the district court to instruct the jury that he had to know that he was under indictment at the time of purchase in order to be convicted under Section 922(h)(1). The court declined to give the instruction, and petitioner was convicted (Pet. App. 2-4).

The court of appeals affirmed. The court first noted (Pet. App. 2-3) that "[t]echnically, no challenge to the instructions is properly before us because no transcript has been received showing either the instructions given or the requests refused. * * * It is the duty of counsel to see that the record is complete."[3] On the merits, the court indicated its view (*id.* at 3) that "the government does not have to prove scienter." The court did suggest, however, that after hearing testimony concerning a defendant's understanding about the continuing effects of an

[2]Persons convicted of violating 26 U.S.C. 7201 are subject to imprisonment for not more than five years.

[3]The court of appeals did not have the transcript of the trial court's jury instructions, for petitioner failed to have them transcribed (Pet. App. 2-3). We have secured a transcript and have lodged a copy with the Clerk of this Court. The trial court, over objection, refused to instruct that knowledge was an element of the offense; instead, it made no mention of the issue (Inst. Tr. 9, 27-28).

indictment, "the trial judge should fashion a proper instruction, if one is requested * * *" (*id.* at 4). But the court concluded: "[O]n this record there is no proper request, and clearly no basis for a reversal" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 4-9) that the trial court should have instructed the jury that a defendant cannot be convicted under Section 922(h)(1) unless he knows that he is under indictment at the time of purchase of a firearm. We believe that the court of appeals correctly rejected that contention on the particular facts of this case.

At the outset, we note that the court of appeals was required to decide this case on an incomplete record. Because petitioner had not had the jury instructions transcribed, the record below reflected no request by him for the instruction he now insists upon. This defect may be significant for purposes of determining whether this Court should undertake review of the issue petitioner presents; although the court of appeals admonished that upon proper testimony "the trial judge should fashion a proper instruction, if one is requested," it went on to declare that "on this record there is no proper request, and clearly no basis for a reversal" (Pet. App. 4). It is not clear, therefore, that the Ninth Circuit would uphold the refusal to give an instruction in a proper case where a sufficient record was presented.

It is also unclear that petitioner was entitled to any instruction at all on the question of *scienter*. While we believe that Section 922(h)(1), sensibly read, requires knowledge by a defendant that he has been placed under indictment and would not reach someone never informed of an indictment against him, petitioner has never disputed his knowledge of that fact. Rather, he contends that a gun purchaser must know that he is still under

indictment at the time of the firearms transaction, thus allowing him to plead a subjective mistake of law or fact in defense to the charge. This is a very different matter, for Congress may rationally have concluded that where the dangers of gun possession are high and the imposition on individual prerogatives relatively light, it is appropriate to require that persons informed they are under indictment act at their own risk while the indictment has legal effect. The Ninth Circuit has noted that a comparable section of the Gun Control Act of 1968, 18 U.S.C. App. 1202 (a), "makes possession the offense and does not require *scienter*." *United States* v. *Crow*, 439 F. 2d 1193, 1195, vacated and remanded on other grounds, 404 U.S. 1009.

Despite petitioner's contrary contention (Pet. 4-6), there is no palpable conflict between the Ninth and Sixth Circuits on the *scienter* requirement. The Sixth Circuit has agreed with the Ninth Circuit in *Crow* that Section 1202(a) "makes possession the offense and does not require *scienter*." *United States* v. *Thomas*, 484 F. 2d 909, 915, certiorari denied, 414 U.S. 912. Although the Sixth Circuit did hold that a defendant whose felony indictment had apparently been dismissed in open court was entitled to a *scienter* instruction (*United States* v. *Renner*, 496 F. 2d 922), that court later stated that the *Renner* rule "should be confined to the facts of that case." *United States* v. *Barrett*, 504 F. 2d 629, 634, affirmed, 423 U.S. 212.[4] Moreover, the opinion of the Ninth Circuit below indicates that a *scienter* instruction in such a case, if properly requested, might be appropriate (Pet. App. 4). Thus, we do not believe that review by this Court is necessary at the present time.

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[4]Under the unusual circumstances of the *Renner* case, the result may have been justified upon the alternative ground that the defendant there was not "under indictment" within the meaning of Section 922(h)(1).

2. Petitioner also contends (Pet. 9-11) that 18 U.S.C. 922(h) cannot be applied to shotguns without exceeding Congress' power under the Commerce Clause. Petitioner does not dispute the power of Congress to regulate the flow of handguns, automatic weapons, or explosives because of the grave danger their abuse poses to our society (Pet. 10-11); he argues only that the congressional Findings and Declaration in the Gun Control Act of 1968 (Section 101, 82 Stat. 1213-1214, 18 U.S.C. 921 note) exempts shotguns because they are firearms "appropriate to the purpose of hunting, trapshooting, * * * or any other lawful activity * * *" (*ibid.*). This argument, however, takes too limited a view of Congress' power under the Commerce Clause and misconceives the purpose for the inclusion of shotguns within the statute.

To begin with, it is well-established that Congress may impose criminal sanctions for the purpose of regulating even purely intrastate activities, where the cumulative impact of that class of activities substantially affects interstate commerce. *Perez* v. *United States*, 402 U.S. 146; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241. Moreover, where the class of activities is regulated and that class is within the reach of federal power, courts may not "'excise, as trivial, individual instances' of the class." *Perez* v. *United States, supra*, 402 U.S. at 154 (citation omitted). Congress has properly found that there is widespread trafficking in firearms "moving in or otherwise affecting interstate or foreign commerce" (Section 901(a)(1) of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 225-226). The purpose of the Gun Control Act of 1968 was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency" (S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)).

It is plain that Congress intended the Gun Control Act to remedy the failure of Title IV of the Omnibus Crime Control and Safe Streets Act to include shotguns and rifles within its proscriptions. The House Report on the Act (H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968)) stated: "First, the instant measure imposes restrictions on rifles and shotguns generally parallel to those that [Title IV] imposed on handguns only." The relevant Senate Report (S. Rep. No. 1501, *supra*, at 22) observed: "The firearms abuse problem has been partially met with enactment of title IV to the Omnibus Crime Control and Safe Streets Act of 1968; however, the task has not yet been completed, for that title did not contain the needed controls over rifles and shotguns."[5]

It was entirely rational for Congress to include shotguns within the Act. A shotgun or rifle was used in nearly 30 percent (or over 2,000) of the yearly murders committed by use of a firearm at the time the statute was enacted. H.R. Rep. No. 1577, *supra*, at 8. Moreover, murder made up only a fraction of the crimes in which firearms, including shotguns, were utilized. *Id.* at 7. In these circumstances, the regulation of the receipt of shotguns by persons indicted for or convicted of a felony falls clearly within the permissible bounds of the

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[5]While Congress did not intend "to place any *undue or unnecessary* Federal restrictions or burdens on *law-abiding citizens* with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity * * *" (Section 101, 82 Stat. 1213-1214, 18 U.S.C. 921 note (emphasis added)), it thus did not entirely exempt shotguns from the coverage of the Act. A shotgun is a "firearm" within the meaning of the Act (18 U.S.C. 921(a)(3)), though it is generally not a "destructive device" (18 U.S.C. 921(a)(4)(B)). The Act itself makes plain at several points that shotguns fall within its scope. See, *e.g.*, 18 U.S.C. 922(b)(1), (3).

commerce power. See *Scarborough* v. *United States*, 431 U.S. 563, 569-571; *United States* v. *Haddad*, 558 F. 2d 968, 973 (C.A. 9); *United States* v. *Rosenbarger*, 536 F. 2d 715, 718 (C.A. 6), certiorari denied, 431 U.S. 965; *Mandina* v. *United States*, 472 F. 2d 1110, 1113-1114 (C.A. 8), certiorari denied, 412 U.S. 907; *United States* v. *Nelson*, 458 F. 2d 556, 559 (C.A. 5); *Stevens* v. *United States*, 440 F. 2d 144, 151-152 (C.A. 6); cf. *Huddleston* v. *United States*, 415 U.S. 814, 824, 833.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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